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No. 74-1629

In the Supreme Court of the United States

OCTOBER TERM, 1975

JOAN ANNE KARRIGAN, BARRY BERK AND ALVIN GERSON LEVITT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	3
Conclusion	12

CITATIONS

Cases:

Dunn, In re, 507 F. 2d 195	7, 8
Jones v. *United States*, 362 U.S. 257	8
Maryland v. *Wirtz*, 392 U.S. 183	5
Perez v. *United States*, 402 U.S. 146	5
Schneider v. *United States*, 459 F. 2d 540, certiorari denied, 409 U.S. 877	4, 5
United States v. *Armocida*, 515 F. 2d 29, pending on petition for a writ of certiorari, Nos. 74–6683 and 74–6686	7
United States v. *Bobo*, 477 F. 2d 974	8
United States v. *Brick*, 502 F. 2d 219	7
United States v. *Curreri*, 388 F. Supp. 607	7
United States v. *Giordano*, 416 U.S. 505	6
United States v. *Harris*, 460 F. 2d 1041, certiorari denied, 409 U.S. 877	4–5
United States v. *Hunter*, 478 F. 2d 1019, certiorari denied, 414 U.S. 857	4
United States v. *James*, 494 F. 2d 1007, certiorari denied *sub nom. Jackson* v. *United States*, 419 U.S. 1020	7
United States v. *Kahn*, 415 U.S. 143	7
United States v. *Kalustian*, C.A. 9, No. 74–3314, decided August 4, 1975	10, 11, 12
United States v. *Likas*, 448 F. 2d 607	8, 9
United States v. *Meese*, 479 F. 2d 41	4
United States v. *Pacheco*, 489 F. 2d 554, certiorari denied, No. 73–1510, April 14, 1975	7

593–741—75——1

Cases—Continued Page
United States v. *Palmer*, 465 F. 2d 697, certiorari denied, 409 U.S. 874 4
United States v. *Riehl*, 460 F. 2d 454 4
United States v. *Robertson*, 504 F. 2d 289, certiorari denied, No. 74–974, April 14, 1975 7
United States v. *Sacco*, 491 F. 2d 995 4
United States v. *Smaldone*, 485 F. 2d 1333, certiorari denied, 416 U.S. 936 4
United States v. *Smith*, C.A. 9, Nos. 74–2936—74–2937, decided July 2, 1975 ..... 7, 8, 11
United States v. *Turner*, C.A. 9, No. 73–2740, decided July 24, 1975 ..... 8, 11
Statutes:
Omnibus Crime Control and Safe Streets Act of 1968, Title III, 18 U.S.C. 2510–2520 6
Organized Crime Control Act of 1970, 84 Stat. 922 ... 4
18 U.S.C. 2518(1)(c) 5, 6, 7, 8, 10, 11, 12
18 U.S.C. 2518(3)(c) 6
18 U.S.C. 1955 ..... 2, 3, 4, 5
18 U.S.C. 1955(b)(1) 3
18 U.S.C. 3109 8
Miscellaneous:
S. Rep. No. 1097, 90th Cong., 2d Sess. (1968) 7

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 514 F. 2d 35.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on March 10, 1975. A petition for rehearing was denied on April 22, 1975 (Pet. App. C). On May 19, 1975, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to June 21, 1975 (Pet. App. D), and the petition was

filed on June 20, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' conduct of a gambling business violated 18 U.S.C. 1955.

2. Whether the affidavits in support of the application for authorization of the wire interceptions in this case adequately demonstrated the inadequacy of other investigative procedures.

STATEMENT

Following a jury-waived trial in the United States District Court for the Central District of California, petitioners were convicted of conducting an illegal gambling business in violation of 18 U.S.C. 1955.[1] Petitioner Karrigan was sentenced to six months' probation and was fined $50; petitioner Berk was placed on one year's probation and was fined $350; petitioner Levitt received three years' probation and was fined $2,500 (Pet. 4–5). The court of appeals affirmed (Pet. App. A).

The essential facts are not in dispute. During May and June of 1971, the Federal Bureau of Investigation, pursuant to court authorization, monitored wire communications at three different locations during the course of an investigation into illegal gambling activities of petitioner Levitt and others. Transcripts of these interceptions and documentary evidence seized

[1] There was an extensive stipulation of facts, a copy of which we are lodging with the Clerk.

during a search conducted pursuant to a warrant showed that petitioner Levitt was engaged in a large-scale gambling operation, which brought in gross receipts in excess of $2,000 daily and on at least two days in excess of $20,000 (Pet. 6).

Customers placed their wagers with the Levitt operation through agents who relayed the bet to the appropriate person within the organization or provided the customer with a telephone number so that he could call in his wager directly. Petitioner Berk was such an agent and, as such, also solicited customers and settled accounts, collecting from losing bettors and paying winners. Once a wager was accepted by the operation, it was relayed to the "back office," where petitioner Karrigan was employed. As the outcome of the various sporting events became available, wins and losses were computed and reported either directly to petitioner Levitt or to him through an accountant (Pet. 6–7).

ARGUMENT

1. Petitioners contend that the facts as stipulated removed their gambling activity from the proper application of 18 U.S.C. 1955. They do not challenge the holding of the court of appeals (Pet. App. A, p. 1) that they were engaged in an "illegal gambling business," as defined by 18 U.S.C. 1955(b)(1). They clearly fit the definitions of the Act. They argue, however, that the stipulation established the purely *local* nature of their operation (Pet. 12–16), and consequently its exemption from any general congressional findings that illegal gambling businesses affect interstate commerce. This claim is without merit.

Contrary to petitioners' contention, the stipulation does not state as a fact that petitioners' activities do not affect interstate commerce but merely states that the telephone interceptions and the other investigative procedures had failed to disclose interstate gambling, interstate travel in connection with gambling, contact with organized crime, or corruption of local law enforcement officials.[2] However, the government was not required under 18 U.S.C. 1955 to show that petitioners' particular illicit gambling activities involved interstate commerce, *United States* v. *Meese,* 479 F. 2d 41, 42–43 (C.A. 8); *Schneider* v. *United States,* 459 F. 2d 540, 541 (C.A. 8), certiorari denied, 409 U.S. 877. And the statute itself is clearly constitutionally sound.

In enacting the Organized Crime Control Act of 1970, 84 Stat. 922, of which 18 U.S.C. 1955 was a part, Congress determined that gambling operations of the size encompassed by 18 U.S.C. 1955 have a substantial impact upon interstate commerce. See 84 Stat. 922–923. The courts have uniformly upheld this exercise of congressional power under the Commerce Clause. *E.g., United States* v. *Sacco,* 491 F. 2d 995 (C.A. 9); *United States* v. *Smaldone,* 485 F. 2d 1333 (C.A. 10), certiorari denied, 416 U.S. 936; *United States* v. *Hunter,* 478 F. 2d 1019 (C.A. 7), certiorari denied, 414 U.S. 857; *United States* v. *Palmer,* 465 F. 2d 697 (C.A. 6), certiorari denied, 409 U.S. 874; *United States* v. *Riehl,* 460 F. 2d 454 (C.A. 3); *United States*

[2] The small portion of the extensive stipulation relied upon by petitioners is reproduced at Pet. 13. For the context of the quoted section see p. 19 of the stipulation.

v. *Harris,* 460 F. 2d 1041 (C.A. 5), certiorari denied, 409 U.S. 877; *Schneider* v. *United States, supra.*

As the class of activities properly has been regulated by Congress, it is not necessary, to uphold application of the statute, to prove that individual activities within the class, such as petitioners' conduct of an illegal gambling business, had an effect upon commerce. *Schneider* v. *United States, supra,* 459 F. 2d at 541. See also *Perez* v. *United States,* 402 U.S. 146, 152–154. Nor can courts "excise, as trivial, individual instances" of the prohibited class of activities. *Maryland* v. *Wirtz,* 392 U.S. 183, 193.

There is likewise no merit to petitioners' contention that the statute should not apply to them because the gambling activities that Congress intended to regulate were exclusively those under the auspices of organized crime (Pet. 18–21). Although Congress, in enacting 18 U.S.C. 1955, was deeply concerned with the impact of illegal gambling activities conducted by organized crime, that was not its only concern, and the language of the Act clearly prohibits large-scale illegal gambling operations such as petitioners', without reference to a demonstrated relationship with organized crime.

2. 18 U.S.C. 2518(1)(c) requires that each application for an order authorizing the interception of wire or oral communications shall include, *inter alia*—

> a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous * * *

Similarly, a finding by the issuing judge that alternative investigative procedures are inadequate is a prerequisite for the issuance of an order authorizing electronic surveillance. 18 U.S.C. 2518(3)(c). Petitioner contends that the affidavits in support of the applications for authorization to conduct wire interceptions in this case were inadequate to meet the requirements of 18 U.S.C. 2518(1)(c).[3]

Sections 2518(1)(c) and 2518(3)(c) were part of the safeguards included in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510–2520, to ensure that the statutory authority to conduct electronic surveillance embodied therein would "be used with restraint and only where the circumstances warrant" such an investigative device. *United States* v. *Giordano*, 416 U.S. 505, 515. In short, electronic surveillance was "not to be routinely employed as the initial step in criminal investigation" (*ibid.*). On the other hand, the provisions of 18 U.S.C. 2518(1)(c) were obviously not intended to frustrate the use of wire interception as a valid investigative tool by requiring an unreasonably stringent showing of need:

[3] There were three separate applications and orders authorizing electronic surveillance involved here. An order was entered on May 13, 1971, authorizing the interception of conversations of certain conspirators over seven different telephones at various premises in Los Angeles, California (C.R. 251–255). On June 8, 1971, an extension order was entered authorizing continued interceptions over three of those telephones (C.R. 246–250). Finally, an order entered on June 15, 1971, authorized electronic surveillance on three different telephones located in Los Angeles and North Hollywood, California (C.R. 191–194).

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> Merely because a normal investigative technique is theoretically possible, it does not follow that it is likely. [Citations omitted.] What the provision envisions is that the showing be tested in a practical and commonsense fashion.

S. Rep. No. 1097, 90th Cong., 2d Sess. 101 (1968).

The requirement of Section 2518(1)(c) "is simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States* v. *Kahn*, 415 U.S. 143, 153, n. 12. "Congress * * * did not attempt to require 'specific' or 'all possible' investigative techniques before orders for wire taps could be issued. * * * '[T]he law does not require the government to use a wiretap only as a last resort.'" *United States* v. *Smith*, C.A. 9, Nos. 74–2936 and 74–2937, decided July 2, 1975.

Numerous decisions have stated various tests to be employed in evaluating the nature of the showing required by 18 U.S.C. 2518(1)(c).[4] These decisions teach, in sum, that the requirement of Section 2518(1)(c) is satisfied when—viewing the affidavit in a practical and commonsense fashion—a sufficient fac-

[4] See generally, *United States* v. *Armocida*, 515 F. 2d 29, 38 (C.A. 3), pending on petition for a writ of certiorari, Nos. 74–6683, 74–6686; *In re Dunn*, 507 F. 2d 195, 197 (C.A. 1); *United States* v. *Robertson*, 504 F. 2d 289 (C.A. 5), certiorari denied, No. 74–974, April 14, 1975; *United States* v. *Brick*, 502 F. 2d 219, 224 (C.A. 8); *United States* v. *James*, 494 F. 2d 1007 (C.A. D.C.), certiorari denied *sub nom. Jackson* v. *United States*, 419 U.S. 1020; *United States* v. *Pacheco*, 489 F. 2d 554, 565 (C.A. 5), certiorari denied, No. 73–1510, April 14, 1975; *United States* v. *Curreri*, 388 F. Supp. 607, 618–622 (D. Md.), and cases cited therein.

tual basis is shown from which the issuing authority can reasonably conclude that electronic surveillance is necessary to obtain evidence for the successful prosecution of persons known to be involved in the criminal activities under investigation, or is necessary to ascertain the full scope of such criminal activities and the identity of the participants therein. See *United States* v. *Turner,* C.A. 9, No. 73-2740, decided July 24, 1975, slip op. 7-8. In making this determination, the issuing judge must consider the type of illegal activity under investigation and the extent to which telephonic communications are involved therein (*United States* v. *Bobo,* 477 F. 2d 974 (C.A. 4)). He should also weigh the opinions and conclusions of experienced investigators in determining whether to authorize the wire interception (*In re Dunn, supra,* 507 F. 2d at 197). Accordingly, considerable discretion rests with the issuing judge in determining whether the interception is necessary (*United States* v. *Smith, supra,* slip op. at 2),[5] and his determination should be accorded considerable weight by the reviewing court (*Jones* v. *United States,* 362 U.S. 257, 270-271). The affidavits here satisfied the showing required by Section 2518(1)(c) as consistently interpreted heretofore.[6]

[5] In this connection, the issuing judge is, of course, free to request additional information regarding the feasibility of alternative investigative techniques if he is not satisfied with the showing made in the application.

[6] Petitioners' reliance (Pet. 10-11) upon *United States* v. *Likas,* 448 F. 2d 607 (C.A. 7), which held that federal agents could not dispense with the statutory requirements of 18 U.S.C. 3109 because of the possible destruction of evidence, is misplaced. Here, the possibility that evidence would be destroyed was presented by the affiant to show the inadequacy of conventional investigative techniques in order to obtain a court authorization as required by law, rather than as in *Likas,* to justify a departure from the law.

Although an identical paragraph was included in each of the three affidavits submitted to show the need for electronic surveillance in the investigation of petitioners' gambling business (C.R. 187-189, 225-227, 243-244), the statements contained therein, in addition to being based on the affiant's knowledge and experience in similar gambling investigations, were based on rational inferences to be drawn from the facts in this particular case. As the court below noted (Pet. App. A, p. 3):

> [Each affidavit] summarized the evidence produced by the following investigative techniques: physical surveillance of the suspects, inspection of phone company records and police records, a previous wiretap, and the use of informants. [The affiant] declared that all informants had stated they would refuse to testify even if granted immunity and he determined that the remaining evidence would not suffice to support a conviction. The affidavit concludes with [the affiant's] reasons for believing that other investigative procedures would be unlikely to produce usable evidence, specifically the general unwillingness of bookmaking customers to testify and the proclivity of bookmakers to keep unintelligible records, if any, and to destroy them in case of search.

Viewing the affidavits as a whole, we submit that the court below correctly concluded that the affidavits

established the need for electronic surveillance in this particular case (Pet. App. A, p. 4):

> [I]n this case, agents had engaged in investigation for over three months, including physical surveillance of the suspects, had reasonably established that their informants would not testify, and had reason to believe that the other evidence thus far produced would not support a conviction. Further, physical surveillance of the residence identified by informants as housing the four "front office" telephones disclosed that it was fronted by a 5-foot high chain link fence topped by 3-stranded barb wire and had two large dogs patrolling the area between house and fence. Thus the government demonstrated a factual basis for its concern that the suspects might have time and inclination to destroy evidence in case of search.

For the foregoing reasons, we submit that the decision below is correct and in accord with the substantial weight of authority. It may, however, be inconsistent with the subsequent Ninth Circuit decision in *United States* v. *Kalustian*, No. 74-3314, decided August 4, 1975. The panel in *Kalustian* suppressed evidence derived from a court authorized wire interception on the grounds that the supporting application and affidavit failed to satisfy 18 U.S.C. 2518(1)(c). It enunciated the following standard to be applied in assessing compliance with that statute (slip op. 6):

> The Government must (1) inform [the issuing authority] of every technique which is customarily used in police work in investigating the type of crime involved, and (2) explain

> why each of them has either been unsuccessful or is too dangerous or unlikely to succeed because of the particular circumstances of that case.

The court in *Kalustian* apparently rejected the affiant's assertion of the need for the electronic surveillance based on his knowledge and experience in similar gambling cases as being "mere conclusions" (*ibid.*) which were insufficient to satisfy the requirements of Section 2518(1)(c).[7] It may well be that the *Kalustian* panel would have found the affidavits involved here inadequate.

We intend to petition for rehearing *en banc* in *Kalustian*, since we believe it was wrongly decided. It appears to impose substantially more stringent requirements for the showing under Section 2518(1)(c) than have previously been required by any of the courts that have interpreted that provision (see note 4, *supra*), including other panels of the Ninth Circuit. Neither in this case, nor in two prior decisions of that court, have requirements as stringent as those adopted in *Kalustian* been imposed.[8] We are aware of two other cases presently pending before the Ninth Circuit involving this same issue.[9] In view of these

[7] The court did not elaborate on its requirement that the issuing judge must be advised of "every technique customarily used" in investigating gambling offenses, and it is impossible to ascertain whether it believed that the affidavit before it was also insufficient in that regard.

[8] See *United States* v. *Smith*, *supra*; *United States* v. *Turner*, *supra*. The court in *Kalustian* made no mention of any of the circuit's prior cases involving the interpretation of Section 2518(1)(c).

[9] *United States* v. *Pezzino*, No. 75-2305; *United States* v. *Pulliam*, No. 75-1382.

cases, and of our intent to petition for rehearing *en banc* in *Kalustian,* there is a reasonable likelihood that the Ninth Circuit will further clarify its position on the interpretation of Section 2518(1)(c). Because of these considerations, and since the decision in the instant case does not conflict with that of any other circuit, we suggest that this issue is not now ripe for review by this Court in light of the fact that the Ninth Circuit has not yet had an opportunity to decide whether *Kalustian* accurately represents its views on the subject.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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